STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Hon. Theresa M. Brennan
53rd District Court
224 N. First Street
Brighton, MI 48116
_____/

Formal Complaint No. 99
Master: Hon. William J. Giovan

EXAMINERS' RESPONSE TO OBJECTION TO EXAMINER'S NOTICE

Respondent objects to the Examiner's notice that one of the stipulations into which the parties entered may be materially inaccurate. She does not claim that the stipulation is accurate. Rather, she claims it is sacred, and even if not sacred, would be complicated to correct.

The stipulation is not sacred. Respondent's contrary opinion rests entirely on her interpretation of *Dana Corp. v. Employment Security Commission*, 371 Mich 107 (1963). *Dana* quite properly held that courts are not free to alter stipulations entered by the parties. *Dana* was concerned with a stipulation that had been altered by a referee without input from the parties. The Michigan Supreme Court held that for the factfinder to alter a stipulation would be a denial of due process, because the parties cannot make a record regarding the change.

Dana is certainly correct when it comes to a court or other fact-finder unilaterally altering a stipulation, which were the facts before the Court.[1] However, it does not purport to hold that there can never be relief from an erroneous stipulation. *Dana* rested on the violation of due process that would occur if a court altered a stipulation and there was no opportunity to make a record. That problem does not exist, though, if there is an opportunity to make a record. *Dana* does not address the situation where there is no due process concern.

It cannot be the case that stipulations become forever sacred throughout the factfinding process, incapable of ever being altered or corrected except by mutual consent of the parties even when new or previously unknown circumstances or information call their accuracy into question. There is no reason for such rigidity, so long as no party is unfairly prejudiced by amending the stipulation, and any unfair prejudice is prevented by providing sufficient notice and opportunity to be heard.

The law recognizes what common sense suggests. "A court has the power to relieve a party from a stipulation where there is evidence of mistake, fraud, or unconscionable advantage." *People v Williams,* 153 Mich App 582, 588 (1986), citing *Powell v Martone,* 322 Mich 441, 445-446 (1948). See also *Valentino v*

[1] Even *Dana* recognized that courts are not bound to accept stipulations in all circumstances. For instance, a court can reject a stipulation that is incomplete or legally erroneous. 371 Mich at 111. *Dana* identified the time for that rejection to take place: before the factfinding is complete. The Examiners do not argue that the stipulation at issue is either incomplete or legally erroneous. We point this out to note that at this stage of the proceedings, stipulations are *not* sacred.

Oakland County Sheriff, 134 Mich App 197, 206-207 (1984). *Williams* referred with approval to 73 Am.Jur.2d, Stipulations, § 15, pp 550-551, which in relevant part states:

> A stipulation entered into under a mistake of material fact concerning the ascertainment of which there has been reasonable diligence exercised is the proper subject for relief. However, it has been held that when there is no mistake, but merely a lack of full knowledge of the facts which is due to the failure of a party to exercise due diligence to ascertain them, there is no proper ground for relief. Fraud in the procurement of a stipulation is generally considered sufficient in itself to warrant relief against it. Likewise, relief has been granted from a misleading stipulation.
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> *Williams* at p 589.

In this case the parties entered into a stipulation based on facts produced by a Michigan State Police investigation and input from respondent. It was reasonable to rely on those facts at the time the parties agreed to the stipulation. The new information is due to additional State Police investigation that had not been conducted at the time the stipulation was agreed to. All of the facts in the new State Police report that differ from the stipulation were beyond the ability and resources of the Examiners to obtain. There was no failure of diligence here.

While there is no unfair prejudice to allowing the parties relief from an inaccurate stipulation, the rigidity for which respondent argues would create an obstacle, in certain circumstances, to finding the truth. Obstacles to finding the truth

should be tolerated only when supported by an important reason. There is no such reason when there is a path to the truth that does not unfairly prejudice any party.

Of course, all of this discussion may be a little academic. The Examiners merely provided a notice of potential inaccuracies. There is no need to explore granting relief from the stipulation if the potential differences would not be material to the Commission's decision.

If, on the other hand, the potential differences *would* be material, that underscores why it is important to the ultimate goal – finding the truth – for the stipulation to be accurate.

Respondent suggests that the Examiners' providing notice was itself improper and has "tainted" the Commission. Notably, respondent's counsel did not express this concern when the Examiners sought his concurrence in amending the stipulation. At that time counsel explained that for various reasons he could not concur, but he raised no objection when the Examiners informed him that they felt an obligation to bring the potential inaccuracies to the Commission's attention.

In any event, respondent's concern for "taint" is misplaced. It is the business of a court to decide which facts to accept and which to reject. A court is not a jury, for which concerns about taint are real. Courts are regularly exposed to facts they ultimately conclude they cannot consider, for legal or procedural reasons. That exposure is not a "taint."

Finally, respondent is correct that if the proofs are reopened she is entitled to notice and a chance to respond, and she is entitled to more time than the period between now and the March 4 hearing to prepare. While that is true, it is not dispositive.[2] If the Commission believes that anything in the notice might make a material difference, it is important to reopen the proofs to ensure that the Commission has complete and accurate information, even if doing so engenders delay.[3]

[2] Notice of the new information was given to respondent on January 2, when the Examiners received it from the State Police, although the concept of revising the stipulation was not raised at the time. Respondent was first alerted to the fact that there were differences between the stipulation and the new information on January 9, in the Deputy Director's petition for interim suspension. Although the notice requirements of MCR 9.218 must certainly be followed, respondent will have known of the "new" information for over two months as of the Commission hearing on March 4.

[3] Respondent suggests that the Master should be recalled for any new factfinding. That is not the Commission's only option. MCR 9.218 contemplates that additional evidence may develop after the Master has submitted his report, and allows for the Commission to take evidence under those circumstances.

In addition, respondent's estimate that the hearing will take "hours" is unrealistic. The facts are very limited. The Examiners estimate that if there actually were a hearing (and there is still no indication that the new evidence is even in dispute), the hearing would take no more than an hour.

For these reasons, the Examiners ask the Commission to consider whether the notice raises any material question, notwithstanding respondent's objections to its doing so.

Respectfully submitted,

/s/ Lynn Helland
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Dated: February 25, 2019